(1) No. _____

Supreme Court, U.S.
FILED

03 787 OCT 15 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID BELL, WARREN GULLEY, WARRYN SIMON, LUIS ANDRADE,

Petitioner,

vs.

CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The

United States Court of

Appeals For The 5th Circuit

PETITION FOR WRIT OF CERTIORARI

PRO SE

DAVID BELL, WARREN GULLEY, WARRYN SIMON, LUIS ANDRADE

301 N. INDUSTRIAL BLVD.

RED OAK, TEXAS 75154

972-965-1358

QUESTION PRESENTED

I. Whether petitioners established a prima facie case when petitioners were downgraded and denied a promotion in violation of Title VII based on gender.

LIST OF PARTIES

The undersigned certifies that the following persons have an interest in the outcome of this case.

1. David Bell – Plaintiff/Appellant.
2. Warren Gulley – Plaintiff/Appellant.
3. Warryn Simon – Plaintiff/Appellant.
4. Luis Andrade – Plaintiff/Appellant.
5. Kenny R. Kirby, Counsel and Counsel of record for Plaintiffs/Appellants at lower levels David Bell, Warren Gulley, Warryn Simon and Luis Andrade.
6. City of Dallas – Defendant/Appellee.
7. Janice Moss, City of Dallas – Counsel and Counsel of record for Defendant/Appellee City of Dallas.
8. Andrea Hyatt, City of Dallas – former Counsel and Counsel of record for Defendant/Appellee City of Dallas.

CORPORATE DISCLOSURE STATEMENT

The petitioners are not a corporation and are not affiliated with a corporation.

TABLE OF CONTENTS

Page

Opinions Below.....1

Statement Of Jurisdiction.....1

Constitutional and Statutory Provisions.....1

Statement Of The Issues.....1-2

Statement Of The Case.....2-3

Summary Of Argument 3-4

Argument And Authorities.....4-8

Conclusion.....9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Burdene,
450 U.S. at 255-256.....5

Burger v. Cenreal Apartment Mangement Inc.,
168 F. 3d 875, 878 (5th Cir. 1999).....6

Burlington Indus., Inc. v. Ellerth.,
524 U.S. 742 (1998) 7

Board of Trustees v. Sweeney,
439 U.S. 24, 25 (1978) 5

Faragher v. City of Boca Raton.,
524 U.S. 755 (1988) 7

Fierros v. Texas Dep't of Health.,
274 F.3d 187 (5th Cir. 1993) 6

Krystek v. University of Southern Mississippi,
164 F.3d 251 (5th Cir. 1999) 9

Mattern v. Eastman Kodak Company.,
104 F.3d 702 (5th Cir. 1997) 6

TABLE OF AUTHORITIES - Continued

Page

McDonnell Douglas Corp. vs. Green,
411 U.S. 792, 802 (1973) 7

Ray v. Tandum Computer, Inc.,
63 F. 3d 429, 435 (5th Cir. 1995) 5

Robinson v. Shell Oil Co.,
519 U.S. 337 (3rd Cir. 1997) 6

Texas Dep't of Community Affairs V. Burdine,
450 U.S. 248 (1987) 148 F.3d 493
(5th Cir. 1998) 5

Watts v Kroger Co.,
170 F.3d 505, 510 (5th Cir. 1999) 7

Ward v. Bechtel.,
102 F.3d 199, 202 (5th Cir. 1997) 5

Wilson v. Belmont Holmes,
970 F.2d 53 (5th Cir. 1992) 5

OPINIONS BELOW

The decision of the Northern District of Texas, Dallas Division, was issued on August 7, 2002. The decision of the United States Fifth Circuit of Appeals was issued on July 18, 2003.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its decision on July 18, 2003 and petitioners filed their petition for a writ of certiorari on October 16, 2003. Jurisdiction in this court exists under 28 U.S.C. 1254 and under Title VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title VII was drafted to confront and stop the evils of discrimination in employment actions. The central question in this case is whether petitioners experienced an adverse employment action. The fifth Circuit has restricted what meets an adverse employment action. Petitioners believe the Fifth Circuits definition is too restrictive and in violation of the definition defined by the Supreme Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting Defendants' motion for summary judgment because summary judgment evidence did establish that the Plaintiffs,

David Bell, Warren Gulley and Warryn Simon established a prima facie case that they were denied a promotion under the Title VII because of their gender?

STATEMENT OF THE CASE

This civil rights action was filed on January 4, 2001. An answer and a motion to dismiss was filed on behalf of the City of Dallas on March 12, 2001. A first amended complaint was filed on May 14, 2001 and an answer to that complaint was filed by the City of Dallas on May 7, 2001 . Order by Court granting in part and denying in part motion to dismiss; plaintiff's racial discrimination claim under Title VII is dismissed with prejudice and defendant's motion to dismiss plaintiff's gender discrimination claim is denied. . A second amended civil complaint was filed on October 10, 2001 and a second amended answer was filed on December 17, 2001. .

On March 29, 2002 motion for summary judgment by the defendant. On April 1, 2002 motion by plaintiffs for summary judgment. Defendant filed its response to the summary judgment motion on April 22, 2002. Defendant filed its response to the summary judgment motion on April 22, 2002..

On August 7, 2002 the district court granted summary judgment in favor of Defendant City of Dallas on all claims. (See appendix). On August 7, 2002 the district

court granted final judgment in favor of the Defendant on all claims.

On September 3, 2002 the Plaintiffs filed their notice of appeal to the Fifth Circuit.

SUMMARY OF ARGUMENT

In the present case, Plaintiffs David Bell, Warren Gulley, Warryn Simon, all African American males employed at the City of Dallas in the Communication Information Services Department alleged that the City of Dallas used the reclassification system to eliminate competition for positions and selectively discriminated against them on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. *2000e et seq. Luis Andrade and Sharon Goree (female) were also employed in the same department. Plaintiffs Bell and Andrade were downgraded or demoted from Senior Electronic Technicians, grade 49, to Network Technicians grade 48. Gulley and Simon were reclassified from Electronic Technician 48 to Network Technician 48. Sharon Goree held the position of Network Technician, grade 48 and was reclassified to Information Technology 63. Plaintiffs maintain that Sharon Goree was upgraded and selected to the Information Technology 63 position based on gender in violation of Title VII. Plaintiff's believe defendant used the reclassification system to selectively discriminate and place Sharon Goree in the IT 63 position without allowing competition for the position.. Out of a group of five employees, the two senior

employees were demoted while the least senior and least qualified was selected without competition to an IT 63 position. Bell and Andrade argue that they were reduced in rank or demoted or downgraded in violation of procedural due process under 1983 and the Fourteen Amendment to the United States Constitution and in breach of their employment contract with the City of Dallas.

ARGUMENT AND AUTHORITIES

I. **The district court did err in granting Defendants' motion for summary judgment because the summary judgment evidence did establish a prima facie case by plaintiffs and that Sharon Goree was promoted to IT 63 because of her gender violation of Title VII.**

Title VII of the Civil Rights Act of 1964, as amended, makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual because of that individual's sex. 42 U.S.C. 2000e-2(a)(1) (1994). The courts have developed theories to prove discrimination. A plaintiff alleging intentional sex discrimination has the initial burden of establishing a prima facie case of discrimination. In most cases, the plaintiff proves a prima facie case of disparate gender discrimination by showing four elements: 1) the plaintiff belongs to a protected class; 2) The plaintiff applied for or was eligible for consideration for the job opening or position; 3) the plaintiff was qualified for but was

denied the job; 4) the position was filled by a person of the opposite gender (someone outside of the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Ward v. Bechtel*, 102 F.3d 199, 202 (5th Cir. 1997). Plaintiff need not provide direct evidence of discriminatory motive, but may rely on circumstantial evidence. The plaintiff must prove the elements by a preponderance of the evidence. *Texas Dep't of Community Affairs v Burdine*, 450 U.S. 248, 254-255 (1987); *Wilson v. Belmont Homes*, 970 F.2d 53,57 (5th Cir. 1992). If the employee establishes a prima facie case, then the employer has the burden of articulating a legitimate, non-discriminatory reason for the rejection or other adverse action. *See Burdene*, 450 U.S. at 254-255; *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); *Ray v. Tandem Computers, Inc.*, 63 F. 3d 429, 435 (5th Cir. 1995). If the employer adequately articulates a non-discriminatory reason for the employment action in question, the burden shifts back to the employee to prove, by a preponderance of the evidence, that the legitimate reason offered by the employer was not its true reason but was a pretext for intentional discrimination. *Burdene*, 450 U.S. at 255-256.

In the present case, Plaintiffs' primary complaint was that they were not "promoted" or "upgraded" to the IT 63 position while Sharon Goree was promoted to the IT 63 position while the two senior employees of the group were downgraded because of gender. To support this claim of discrimination, each Plaintiff first had to establish that he was a member of a protected group. Defendant City of Dallas does not challenge Plaintiffs' status as members of the protected class of males under Title VII. There was no

dispute in this case that plaintiffs met the first element and are males and a member of a protected class. The second element to establish a prima facie case seem to be in dispute. The court found that a question of fact exists as to whether plaintiffs were indeed qualified and sought appointment to the disputed IT 63 position. The trial court record was clear that Bell and Andrade were a grade 49 and the lead workers and supervisors of Sharon Goree, a grade 48, before she was place in the IT 63 position. The record is clear that all plaintiffs were either as qualified as or more qualified than Sharon Goree. With such proof, the second element of a *prima facie* case was established or at least raise a question of fact for a jury to decide.

The third element of the prima facie case is where the dispute rises. The Fifth Circuit has further clarified that Title VII was only designed to address "ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon ultimate decisions." *Burger v. Central Apartment Management, INC.*, 168 F.3d 875, 878 (5th Cir. 1999) (quoting *Mattern v. Easter Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). The Fifth Circuit seems to have narrowly construed what constitutes an "adverse employment action that the result is to deny access to the Courts to numerous victims of discrimination. Such a narrow construction seem to conflict with the definition of an "adverse employment action" as defined by the United States Supreme Court. In *Fierros v. Texas Dep't of Health*, 274 F.3d 187 (5th Cir. 2001), the Fifth Circuit was asked to repudiate its "ultimate employment decision doctrine because it was allegedly contrary to the supreme Court's decisions in *Robinson v*

Shell Oil Co., 519 U.S. 337 (1997), and *Burlington Indus v. Ellerth*, 524 U.S. 742 (1998), and *Faragher V. City of Boca Raton*, 524 U.S. 775 (1998). However, in *Fierros*, the Fifth Circuit did not address the issue of whether this Court's definition of an "ultimate employment decision" is in conflict with the Supreme Court's definition. In *Robinson*, *Burlington Industries*, and *Faragher*, the Supreme Court sets out a broad definition of "tangible employment actions": "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." This court has recognized that the definition of "tangible employment action" developed in sexual harassment context in Burlington Industries may be the proper "adverse employment action" standard for the Title VII retaliation claims. *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999). In Plaintiffs case, the reclassification culminated in Bell Andrade's position being reclassified and downgraded from Senior Electonic Technicians, grade 49 to Network Technicians, grade 48. Sharon Goree was reclassified and upgraded from Electronic Technician, grade 48 to IT 63. Bell and Andrade's pay was decreased. Defendants never disputed that Bell and Andrade lost pay and salary. Reclassification is a different animal whereby the Court should analyze whether any of the five parties involved received an increase or decrease in salary. The reclassification process violated Title VII. Thus, Bell and Andrade loss of salary constitutes an ultimate employment decision whether Sharon Goree received an increase or not. When Sharon Goree was upgraded to IT 63, she was placed in a career path with promotional growth while the plaintiffs were downgraded to a position without a

career path. (R.0233), (R.0227). Sharon Goree's upgrade to IT 63 included a higher salary range (R.0233). Sharon Goree has been promoted twice since this injustice. (R.0227) Sharon Goree's upgrade is a different career series and has the opportunity to promote to a higher position. (R0240). The elimination of the 49 positions (Bell and Andrade) eliminated the lead positions and the opportunity for promotion. (R0241). As the result of the reclassification, plaintiffs are stuck without realistic promotional opportunities. Sharon Goree received a change in employment status. Sharon Goree received an office while plaintiffs were forced to vacate their office. (R. 0242), (R.0237). Sharon Goree was allowed to got school during the work day without documenting it as time off on her time sheet. (R.236). Sharon Goree, the only person that benefited from the reclassification, had a special relationship with Steve Rhodes, the supervisor at the time. (R.0245). Sharon Goree's reclassification to the IT 63 position was exempt and therefore ineligible to earn overtime. (R.1057). Thus, Sharon Goree was relieved from being on call to work overtime. Trial court decided that there was no need to address the plaintiff's evidenced of pretext. However, if this Court decides plaintiff established a prima facie case, then the City of Dallas failed to articulate a legitimate, non-discriminatory explanation for upgrading Sharon Goree to the IT 63 position. Defendant claims Steve Rhodes offered the IT 63 position to the plaintiffs and the plaintiffs turned it down. The trial court found that a question of fact exists as to whether Plaintiffs were indeed qualified and sought appointment to the disputed IT 62 position. This articulated explanation is pre textual.

CONCLUSION

Like the Supreme Court, the First, Ninth, Tenth and Eleven Circuits generally have defined "adverse employment" action rather broadly. In addition the EEOCs definition of ultimate employment decision is expansive. Plaintiffs believe that under current Court law their facts constitute and ultimate employment action. And, therefore, a fact question exists as to whether plaintiffs were discriminated against. The Plaintiffs should avoid summary judgement against them given that there is evidence form which a reasonable inference could be drawn that the real reason for any failure to "promote" them was because of their gender, that is, that gender was a determinative factor in the decision not to "promote" them. *Krystek v. University of Southern Mississippi.* 164 F.3d 251, 256 (5th Cir. 1999).

Respectfully submitted

David Bell

Warren Gulley

Warryn Simon

Luis Andrade

COPY

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID BELL, WARREN GULLEY, WARREN SIMON, AND LUIS ANDRADE	§	U.S. District Court for Northern District of Texas
	§	**FILED**
	§	August 07, 2002
	§	Clerk U.S. District Court
Plaintiffs	§	
v.	§	**CIVIL ACTION NO.**
	§	**3:01-CV-0029-P**
CITY OF DALLAS,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are the following:

1. Defendant's Motion for Summary Judgment, with brief in support and appendix, filed March 29, 2002;

2. Plaintiffs' Motion for Summary Judgment, filed April 1, 2002.

3. Defendant's Response to Plaintiffs' Motion for Summary Judgment, with appendix, filed April 22, 2002;

4. Plaintiffs' Response to Defendant's Motion and Brief for Summary Judgment, filed April 22, 2002;

5. Defendant 's Motion to Strike Plaintiffs' Response and Brief in Support, filed April 26, 2002;

6. Plaintiffs' Motion for Enlargement of Time to File Summary Judgment Response to Defendant's Motion for Summary Judgment, filed April 29, 2002;

7. Defendant 's Motion to Strike Plaintiffs' Summary Judgment Evidence and Brief in Support, filed May 6, 2002;

8. Defendant's Reply Brief in Support of its Summary Judgment Motion, filed May 7, 2002; and

9. Defendant's Motion to Bifurcate Trial and Brief in Support, filed June 26, 2002.

After a thorough review of the summary judgment evidence, the pleadings, the parties' briefs, and the applicable law, for the reasons set forth below, the Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED, Plaintiffs' Motion for Summary Judgment should be DENIED, and Defendant's Motion to Bifurcate Trial DENIED as MOOT.[1]

BACKGROUND

Plaintiffs David Bell ("Bell"), Warren Gulley ("Gulley") and Warryn Simon("Simon"), all African American males employed by the City of Dallas ("Defendant" or "the City") in the Communication information Services ("CIS") Department, originally brought this suit on January 4, 2001, alleging that the City had used a reclassification system to eliminate competition for positions and selectively discriminated against them on the basis of race and sex in violation o Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000*e et seq.* Orig. Civil Compl. at 1, 5-8. Following a hearing conducted on June 14, 2001, the Court granted in part Defendant's motion to dismiss Plaintiffs Gulley and Simon's claims for race discrimination, but denied the motion insofar

[1] The Court, in discretion, shall Grant Plaintiffs' Motion for Enlargement of Time to File their Summary Judgment Response, which was due on or before April 18, 2002, and shall Deny Defendants' Motion to Strike the same.

Further, Defendants' Motion to Strike objects to several of Plaintiffs' affidavits submitted with their Response to Defendant's Motion for Summary Judgment on a wide variety of evidentiary grounds. Because the Court has found it unnecessary to reply upon the great majority of the challenged testimony, it need not consider each of the Defendants' objections. Instead , insofar as it may be necessary, this Order will address specific objections to those portions of the disputed evidence that the Court regards as relevant to the resolution of the particular summary judgment issues. The remaining portions of Defendants' objections will be DENIED as MOOT.

as their claims for gender discrimination under Title VII. *See* Order dated 6/18/2001.[2] Plaintiffs thereafter amended their complaint to add three new causes of causes of action by Bell and Luis Andrade ("Andrade"), a Hispanic male employed in the same CIS Department, for (1) breach of contract, (2) violation of due process rights, and (3) judgment under the Texas Uniform Declaratory Judgment Act. *See generally* Second Am. Civil Compl.

The actions complained of by Plaintiffs took place following the Dallas City Council's passage of a resolution mandating that one-third of the City's positions be reviewed per year for potential reclassification. Def.'s App. At 113 (Watkins Decl., Exh. 1). At the time, Plaintiffs Bell and Andrade were classified as Senior Electronic Technicians, grade 49, while Gulley , Simon, and Sharon Goree ("Goree"), An African American and the only female employed in the CIS Department, held the positions of Network Technicians, grade 48. Second Am. Civil Compl. at 4-5. Their positions within the CIS Department were evaluated during the 1997/1998 One-Third review by a six-member Compensation Staff ("HR Committee") using the Hay Guide Chart-Profile Method of Job Measurement Def.'s App. at 101-104; Second Am. Civil Compl. at 3. Relying on classification specifications from position description questionnaires ("PDQ"), job audits conducted by an HR representative and the employee, and information supplied by the CIS Department, the HR Committee later made recommendations to the City Council on whether each

position should be downgraded, upgrade, or remain the same. Def.'s App. at 103-104.

At the same time as this city-wide reclassification was taking place, the CIS Department was going through its own reorganization under the direction of Fred Hartrick, who was temporarily

---

[2] The City did not move to dismiss Plaintiff David Bell's complaint. Thus, Bell's claims were not discussed in the Court's previous order.

acting as the Director of CIS. Def.'s App. at 22 (Gulley Dep, at 82), 164-165 (letter by Fred Hartrick dated 12/03/1997). As part of the reorganization, Hartrick planned to merge the Department's two separate help desks into one. Def's App. at 164-165. Under the old structure, the Plaintiffs and Goree took turns staffing the one of the help desks. Def.'s App. at 23 (Gulley Dep. At 83). Under the proposed new structure, Hartrick planned to do away with the rotation and dedicate one of the Department's postions for full-time support in the new, combined desk to be classified as an information Technology Analyst ("IT"), grade 63 position. Def. App. at 22-23 (Gulley Dep. at 82-83), 106 (Holler Decl.), 164-165.

By October 1998, the reclassification and reorganization programs culminated in Bell and Andrade's positions being reclassified and downgraded from Sr. Electronic Technicians, grade 49 to Network Technicians, grade 48. Second Am. Civil Compl. at 3-4. Meanwhile, Gulley and Simon positions were also reclassified from Electronic Technicians, grade 48 to Network Technicians, grade 48, although this meant nothing more than a change in job titles as their grade level, pay scale and job duties remained the same Id. at 4. Plaintiffs, however, complain that Goree was reclassified and upgrade from Electronic Technician, grade 48 to IT 63, a position for which they allege they were not allowed to apply and compete for. Id. at 4-5.

Defendant City counters these allegations by claiming that Steve Rhodes, the Plaintiffs supervisor, approached each one of the Plaintiffs in turn and discussed with them the opportunity of moving into the newly created IT 63 slot. Def.'s App. at 109 (Rhodes Decl. at 2). However, Rhodes states that Plaintiffs all refused the position because it was ineligible for overtime , a significant source of their income, and only Goree expressed interest in taking the position. Id. Defendant also claims that Goree's reclassification was one on paper only since, before she was ever

actually transitioned into the new position, David Morgan, the Director of the CIS Department, decided not to follow through on the initiative by Hartrick to dedicate one electronic technician to full-time help desk duties. Def's App. at 22-23 (Gulley Dep. at 82-83). Instead, as Plaintiffs themselves acknowledge, they all continued their previous practice of taking turns staffing the help desk, even after it was consolidated, and Goree's day-to-day job duties remained the same as before the reclassification. *See* Id; *see also* Def's App. at 56 (Andrade Dep. at 69), 38-39 (Simon Dep. at 60-61); Second Am. Civil Compl. at 4; App. Pl's Mot. For Summ Jl, Ex.1 at 2-3 (Bell Aff. At 2-3). Defendant further insists that regardless, Goree's reclassification was never a "promotion" under the City's personnel rules as she received no increase in pay, but rather her take-home pay decreased because the IT 63 position was exempt and was therefore ineligible to earn overtime. Def.'s App. at 140 (Beck Decl. at 2).[3]

Meanwhile, in their affidavits submitted in support of Plaintiffs' Response to Defendant's Motion for Summary Judgment, Plaintiffs deny they wee ever approached about moving to the newly created IT 63 position, and dispute the truth that Goree did not in fact receive a promotion and a higher salary as a result of being named IT 63 Analyst. Pl.'s Resp. to Def.'s Mot, Ex. A at 1-3 (Bell Aff. at 1-3), Ex. B at 2-4 (Gulley Aff. at 2-4), Ex. C at 1-2 (Simon Aff. at 1-2), Ex. D at 1-2 (Andrade Aff. at 1-2). The Court now proceeds to examine each of the parties arguments.

[3] Rodney Beck, a Human Resource Generalist responsible for employee relations, benefits, compensation, and classification issues for the CIS Department since October 2000, concluded that Goree did not receive a pay raise following the reclassification based on the analysis of payroll records on Plaintiffs and Goree for five pay periods beginning in October 1998, and by comparing each employee's annual salary from 1998 to 2001. *See* Def's App. at 138-141 (Beck Decl. at 1-4); *see also* discussion *infra*.

DISCUSSION

I. The Parties Claims

In this action, according to their last filed complaint, Plaintiffs Gulley, Simon and Bell assert a right of recovery against Defendant City of Dallas for intentional race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Second Am. Civil Compl. at 5-8. It is unclear from the complaint whether a similar claim for intentional discrimination based on either race and/or sex was intended to be brought by Plaintiff Andrade. However, the Court will assume it was for purposed of this Order based on the allegation contained in Plaintiffs' Complaint that "on or about October 1998 Luis Andrade, a Hispanic male, job title (sic) was reclassified and downgraded from Sr. Electronic Technician 49 to Network Technician 48." *See* Id. at 4; *see* also Pls.' Mot. For Summ. J., Ex. 41 (EEOC Charge filed 11/4/1998 wherein Andrade stated; "I believe I am being discriminated against because of my sex, Male, in violation of Title VII").

In addition, Plaintiffs Bell and Andrade bring this action as one for declaratory judgment pursuant to the Texas' Uniform Declaratory Judgment Act, Civil Practice & Remedies Code § 37.001, *et seq*. Second Am. Civil Compl. at 8-9. In essence, Plaintiffs seek a declaration from this Court that: (1) it has jurisdiction to review the demotion and

reclassifications decisions by the City because these ruling and determinations were violative of Bell's and Andrade's constitutional rights and adversely affected their vested property rights in continued employment at the equivalent of a grade 49; (2) Plaintiffs could be demoted only upon a finding of just cause and after a hearing, neither of which was made; and (3) the policies and procedures of Defendant as set forth in the Dallas City Charter were constitutionally defective and violated the Plaintiffs' procedural and substantive due process rights. Id. at 9-10. Bell and Andrade also claim that their demotions

amounted to a wrongful termination of their positions and a breach of their contractual and constitutional rights with regards to their grade 49 jobs. Id. at 11. Moreover, Plaintiffs bring a claim under 42 U.S.C.§1983, for Defendant's unjust deprivation of a protected property interest in their continued employment at the equivalent of a grade 49 in violation of the Fourteenth Amendment. Id. at 12-13.

Meanwhile, Defendant City of Dallas moves this court for relief claiming that summary judgment is proper because: (1) Plaintiffs claims under § 1983 are time -barred; (2) Plaintiffs cannot prove they had a valid contract with the City which was breach or that entitled them to a hearing before their positions could be reclassified; (3) Plaintiffs cannot establish a *prima facie* case on their failure -to-promote claims under Title VII; (4) Plaintiffs cannot adduce evidence to permit a reasonable trier of fact to find the articulated reasons for the City' s actions were pretextual; and (5) the declaratory judgment action sought is not available to settle disputes already pending before a court. *See* Defs. Br. In Supp. Mot. Summ. J. at-ii. Each of these arguments shall considered in turn.

II. Standard for Summary Judgment

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Carrett*, 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diehold, Inc.,* 369 U.S. 654, 655 (1962).

The moving party bears the burden of informing the district court of the basis for its belief

that there is an absence of a genuine issue for trial, and of identify those portions of the record that demonstrate such an absence, *Celotex*, 477 U.S. at 323. Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. Id. at 248-50; *Abbot v. Equity Group. Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. Untied Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 323-23. The Court will not, in the absence of any proof, assume that the nonmoving party could or would prove the essential facts necessary to support a judgment in favor of the nonmovant. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-1076 (5th Cir. 1994).

Finally, the Court has no duty to search the record for triable issues, *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). "the party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his other claim." __ A party may not rely upon un-substantiated assertions as competent summary judgment evidence. *Id.*

III. Promotion Claims

A. Timeliness of Plaintiff Andrade's Judicial Complaint

Under Title VII the time to file a complaint ends on the 90th day after the EEOC has issued its right to sue notice. See 42 U.S.C. § 2000e-f(f)(1); *see also St. Louis v. Texas Worker's comp. Comm'n*, 65 F.3d 43, 47 (5th Cir. 1995). This 90-day limitation period begins to run on the date that the EEOC right to sue letter is delivered to the offices of formally designated counsel or to the claimant himself. *See Ringgold v. Nat'l Maint. Corp.*, 796 F.2d 769, 770 (5th Cir. 1986). In this case, the EEOC sent a letter to Mr. Andrade by certified mail, return receipt requested, on October 5, 2000, notifying him that "conciliation in this matter was unsuccessful" and further informing him of his "right to institute a civil action under Title VII…[which] must be filed in the appropriate court within 90 days of your receipt of this Notice." Pl.'s Mot. for Summ. J., Ex. 50 (Notice of Right to sue). Andrade acknowledges that he received his right to sue letter a week later (on or about October 12, 2000), and proceeded to give it to his attorney. Def.'s App. at 59 (Andrade Dept. at 100).

Plaintiffs Bell, Gulley and Simon filed their original suit against the City on January 4, 2001. *See generally* Orig. Civil Compl. However, Andrade did not join them in this action until the filing of Plaintiffs' Second Amended Complaint on October 10, 2001, well at 90 days from his receipt of the EEOC's notice. Andrade explains that the reason for not joining the other Plaintiffs in their original filing was due to lack of money, stating that "I didn't have any money. I was hoping the EEOC would take the case, but they didn't." Def's App. at 59 (Andrade Dep. at 100).

In those instances where a plaintiff has failed to file his complaint until after more than 90 days have passed since receiving is right to sue letter, the Fifth Circuit has allowed, be it sparingly, equitable tolling to apply. *Rowe v. Sullivan*, 967 F.2d 186, 192 (5th Cir. 1992). Nevertheless, such

instances are limited to situations wherein the claimant has either actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. Id. Here, there is no evidence to support a finding that Andrade either actively pursued a judicial remedy or was tricked by any misconduct on the part of the City in failing to timely file an action in this court. In fact, other courts which have examined a plaintiff's delay in bringing forward their action based on an inability to afford counsel have found such an excuse lacking. *See Jeffries v. Chicago Transit Auth.*, 770 F.2d 676, 680 (7th Cir. 1985) (refusing to recognize inability to pay counsel sufficient excuse for ignoring Title VII's time deadlines); *Williams v. Sears, Roebuck and Co.*, 143 F. Supp. 2d 941, 948 (W. D. Tenn. 2001) (holding that plaintiff's "inability or delay in procuring counsel is not a sufficient excuse" for missing the 90-day filing deadline); *McFarland v. Metro-North Commuter R.R.*, 993 F. Supp. 210,211 (S.D.N.Y. 1998) (holding that a plaintiff's inability to obtain counsel is not a basis for equitable tolling of the 90-day deadline). The Court, therefore, finds that equitable tolling is not appropriate in this case where Plaintiff could have, but did not, vigorously pursue his action or inadvertently missed the filing deadline because of a failure to hire an attorney. Thus, the Court shall grant Defendant's motion summary judgment as to Andrade's claims based on any alleged race and /or sex discrimination under Title VII.

B. The Parties' Burdens Under the Failure to Promote Claims

When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 144 (2000) (*citing Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). That is , the plaintiff's race and/or sex must have "actually played a role in the employer's decision making

process and had a determinative influence on the outcome." *Id.* Plaintiffs must prove intentional discrimination either through direct evidence or indirect evidence. *Price v. Marathon Cheese Corp.,* 119 F.3d 330, 336 (5th Cir. 1997).

Direct evidence of discrimination is evidence that proves the defendant acted with discriminatory intent, without the need for inference or presumption. *Mooney v. Aramco Serv.* Co., 54 F.3d 1207, 1217 (5th Cir. 1995) If direct evidence is unavailable, as is typically the case, the plaintiff may create an inference of discrimination by using familiar McDonnell *Douglass/St Mary's* burden shifting framework. *Russell V. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

To defeat a motion for summary judgment, a plaintiff must first establish a *prima facie* case of discrimination. *Fakurl v. Parsons S.I.P., Inc.,* 123 F.3d 315, 318 (5th Cir. 1997). Such a prima facie case is establish if the plaintiff provides evidence that : (i) he is a member of a protected class; (ii) he sought and was qualified for an available employment position; (iii) he suffered an adverse employment action; and (iv) after he was rejected, the employer promoted, hired, or continued to seek applicants with the plaintiff's qualifications from outside of his protected class. *See McDonnell Douglass,* 411 U.S. at 802; *see also Grimes v. Texas Dep't of Health and Mental Retardation*, 102 F.3d 137, 140 5th Cir. 1996) (discussing an

African-American employee's action against her state employer under Title VII claiming that she was denied promotion because of her race); *Jones v. Flagship Int'l*, 793 F.3d 714, 724 (5th Cir. 1986) (alleging sex discrimination in employer's failure to hire or promote). The Fifth Circuit has further clarified that Title VII was only designed to address "*ultimate* employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Burger v. Central*

Apartment Management, Inc., 168 F3d 875, 878 (5th Cir. 1999) (quoting *Mattern v. Eastern Kodak Co.*, 104 F. 3d 702, 707 (5th Cir. 1997). Ultimate employment decisions those include acts "such as hiring, granting leave, discharge, promoting, and compensating." *Id.*

The prima facie case, once established, raises a presumption of discrimination which the defendant must rebut by articulating legitimate, nondiscriminatory reasons for its actions. *Shackleford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999). This burden on the employer is only one of production, not persuasion, involving no credibility assessments. *Russell*, 235 F.3d at 222. If the employer carries its burden, the mandatory inference of discrimination established by the prima facie case drops out of the picture. *Id.*

Since the ultimate burden of persuasion remains at all times with the plaintiff, the Supreme Court has stated that in attempting to satisfy this burden, the plaintiff-once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision-must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but was a pretext for discrimination. *Reeves,*530 U.S. at 143. Consequently, the Supreme Court has found that a plaintiff's prima facie case,

combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employee was unlawfully discriminated against. *Id.* At 148. However, this is not to say that a showing of pretext alone automatically would entitle an employee to a judgment as a matter of law. *Id.* That is, there may be instances where the employer would be entitled to judgment if the record conclusively revealed some other nondiscriminatory reason for its decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reasons were untrue and there was abundant and uncontroverted independent evidence that no discrimination had

occurred. *Id.*; *see also Price v. Federal Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (noting that whether summary judgment is appropriate depends on numerous factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered"). Regardless, the ultimate burden of persuasion rests squarely on the plaintiff. *Marcentel v. Louisiana Dep't of Transp.*, 37 F.3d 197, 200 (5th Cir. 1994).

C. Application of the Law to the Facts

1. Plaintiffs' Race-Based Claims

During an earlier hearing held on June 14, 2001 the Court granted in part Defendant's motion to dismiss Gulley and Simon's claims for race discrimination after finding that they could not establish a *prima facie* case because, even if they could prove they were rejected for the IT 63 position in favor of Sharon Goree, the City promoted an individual within the Plaintiffs' same protected racial group: African-American. See Order dated 6/18/2001. At the time Defendant did not move to dismiss Plaintiff Bell's complaint: on this ground. However, nothing that the same facts and circumstances apply, the Court shall also dismiss Bell's claims for race discrimination upon these same claims of Title VII race-based discrimination is hereby granted.

2. Plaintiffs' Sex -Based Claims

Defendant City of Dallas does not challenge Plaintiffs' status as members of a protected class (males) under Title VII. However, it does challenge their ability to establish a prima facie case by asserting that Plaintiffs did not seek but rather rejected appointment to the disputed IT 63 position later given to Ms. Goree, and moreover, there is no evidence of an ultimate employment action in

this case. Def's Br. At 13-16

In support of its motion for summary judgment, Defendant relies on the affidavit of Steve Rhodes, the Plaintiffs' supervisor, who states that sometime in late 1997 or early 1998 he approached each one of the Plaintiffs in turn and discussed with them the opportunity of moving into the newly created It 63 slot. Def's App. At 109 (Rhodes Decl. At 2). Rhodes claims that Plaintiffs all refused the position because it was ineligible for overtime, a significant source of their income, and only Goree was willing to take the position. *Id.* Arthur Holler, overall manager for the Operations Division and the Network Services Division, corroborates Rhodes' account that the possibility of a CIS Department employee moving to the new IT 63 position was discussed with each of the network technicians, but that only Goree was interested and willing to accept it. Def's App. At 106-107 (hollers Aff. At 1-2). However, when asked during their depositions whether they would have taken Ms. Goree's job, Plaintiffs each stated either they were not offered the job, or would not have taken the job because they wanted a position higher than her grade 63. See Def's App. At 8-9 (Bell Dep. At 109-110), [4] 26 (Gulley Dep. At 100), [5] 42 (Simon Dep. At 95). [6] Therefore, based on

---

[4] Excerpt from Bell's Deposition:

Q: We're taking – this lawsuit is about whether you would have Sharon 's or not, Okay?

A: Not Sharon's job, I should be up higher than Sharon since I was the senior technician.

Q: Well, do you know that, that's not an option in this lawsuit. This lawsuit is about whether or not you should have had Sharon's position.
A: I didn't have an option to get Sharon's position either. That's part of the lawsuit.
Q: Would have taken it? Would you have taken it when it meant a serious cut in your pay year after year after year?
A: To get into a career series, I wouldn't have took (sic) Sharon's job. I would have took (sic) the level above Sharon
Q: My question is: Would you have taken Sharon's position?

the contradictory evidence provided by the parties. And taking it in the light most favorable to the Plaintiffs, the Court finds that a question of fact exists as to whether Plaintiffs were indeed qualified and sought appointment to the disputed IT 63 position.

As noted *surpra*, by analyzing the "adverse employment action" element in a stricter sense than some other circuits, the Fifth Circuit has limited Title VII's remedies only to "*ultimate* employment decisions" such as hiring, granting leave, discharging, promoting, and compensating, and not to those decisions by employers that arguably might have some tangential effect upon those ultimate decisions. See Burger, 168 F.3d at 878 (interpreting Title VII's protections in the context of a retaliation claim). Defendant City argues that even assuming that Goree's reclassification as an IT 63 Analyst can be classified on paper as a "promotion," she was never moved to the full-time help desk, her day-to-day duties remained the same, and she received a decrease rather than an increase in pay as a result of the reclassification. Def.'s Br. at 9.
The Fifth Circuit in Burger examined a claim where in an employee alleged that his employer

A: I never was offered Sharon's position.

See Def's App. at 8-9 (Bell Dep at 109-110).

[5]Excerpt from Gulley Deposition:

Q: Did Steve Rhodes ever offer you that IT 63 slot

A: No, he didn't.

Q: Did he offer it to anybody else in your group?

A: I don't know if he did or not, but he never offered it to me.

See Def.'s App. at 26 (Gulley Dep.at 100).

[6] Excerpt from Simon Deposition:

Q: Did anybody ever ask you if you wanted that IT 63 position?

A: No, they never asked me.

Q: Did anybody ever offer it to you?

A: No, it was never offered. It was never posted…

See Def.'s App. at 42 (Simon Dep. at 95).

had violated Title VII when it refused to grant him a lateral transfer to another of the company's locations due to his national original and because he had engaged in protected Title VII activities. *Burger,* 168 F.3d at 877. The *Burger* Court, however, held that this refusal did not constitute an "ultimate employment action," since the transfer would have had no material effect on plaintiff's job, the title of the two jobs was the same, the day-to-day duties were the same, the wages at the present job were as high or higher then he would have earned at the new location, and other benefits did not differ. *Id.* at 877-879.

Similarly, in *Carter v. Castillo,* 2001 U.S. Dist. LEXIS 1264, at *1-2 (N.D. Tex. Feb. 7, 2001) (kendall, J.), *aff'd* 2001 U.S. App LEXIS 28239 (5th cir. Dec. 14, 2001), this Court considered the allegations of several African-American plaintiffs had who alleged that during their employment as Deputy Constables in Dallas County, they were discriminated and retailed against by Constable Castillo, a Hispanic, when they were passed over for promotions to "Sergeant" and "Corporal" in favor of other deputies who were Hispanic. After reviewing the evidence, the court noted that despite their official sound, these titles did not hear more concrete significance than if the defendant had "promoted" the deputies to "right hand man" or to

"*consigliere*," since changing their titles to Corporal or Sergeant did not confer any additional authority upon them. *Id.*, 2001U.S. Dist. LEXIS 1264, at *15. The evidence also establish in that case that the change in title did not advance these individuals from a lower salary grade to a higher one. *Id.* Thus, having failed to produce any evidence showing how these "promotion" resulted in pay, responsibility, or assignment differences, "without these ordinary features of a promotion" the court held plaintiffs had established no basis for discerning that a promotion had occurred as would be need ed to show falsity or pretext in defendant's explanation to establish a claim under Title VII. *See Id.*, 2001 U.S. Dist.

LEXIS 1264, at *15-16; see also Brown, 82 F.3d at 656 n. 16 (finding speculative and insufficient plaintiff's allegations in an age discrimination case that younger replacement was "promoted" yet did not receive a pay raise or became a vice-president in connection with that promotion).

In this case, Plaintiffs do not dispute the fact that Goree's appointment to IT 63 did not involve an application and selection process but was merely an administrative reclassification. *See* Second Am. Civil Compl. At 4; *See also* Pls.' Resp. to Def.'s Mot. To Dismiss at 4. Moreover, Plaintiffs acknowledge that following the city-wide reclassification and CIS Department reorganization, they all continued their previous practice of taking turns staffing the help desk, and Goree's day-to-day job duties remained the same as before. *See* Def's App. at 56 (Andrade Dep. at 69), 38-39 (Simon Dep. at 60-61), 23 (Gulley Dep. at 83); *See also* Second Am. Civil Compl. at 4; App. Pl.'s Mot. For Summ. J., Ex 1 at 2-3 (Bell Aff. at 2-3). [7] Nevertheless, in their response to Defendant's motion for summary judgment, Plaintiffs vigorously dispute any assertion that Goree's "promotion" from grade 48 to grade 63 did not result in a pay increase.

In his affidavit in support of Plaintiffs' response, Bell offered several salary figures, charts, tables and other calculations seeming to imply that following the

reclassification in 1998, Goree's salary actually increased and her top pay range was significantly greater than that of Plaintiffs as Network Technician 48's over the ensuing four-year period. App. Pls' Resp., Ex. A at 1-2 (bell Aff.II at 1-2). [8] However, Bell does not provide the Court with the source of these salary figures and

---

[7] Further, the City's written salary administration guidelines emphasize that: "[w]hen a position is upgraded or downgrade ... or [w]hen a position receives reclassification, it is not viewed as a promotion or demotion." *See* Def's App. at 162 .

[8] More specifically, Bell asserts that the 48 position which Goree was in had a top pay of $ 35,000, while the position she resides in today has a pay of $66,000. App. Pls' Resp., Ex. A at 1 (Bell Aff.II at 1). In addition, Bell claims that Goree's base salary was at least the same

Calculations, except to state in a small footnote that "all table calculations are [a] close approximation." Id. at 2 (Bell Aff. II at 2). Therefore, on its face, Bell's affidavit demonstrates no personal knowledge that these figures are accurate, and as such, these figures are unreliable and do not constitute admissible summary judgment evidence sufficient to support its conclusions.

Similarly, in an affidavit provided by Gulley, plaintiffs argue that when Goree was placed in a higher position following the reorganization of October 1998, the City gave her a higher range in base salary, which Gulley considered the equivalent of a raise in Pay. [9] However Gulley's calculations are also intended to be an "approximation," as he clearly states that he would need Defendant to provide "files and exact records" to confirm his figures. See App. Pls.' Resp., Ex. B at 3 (Gulley Aff. II at 3). [10] Nevertheless, the City has sated numerous times, the latest being at a pre-trial hearing held before the Court on August 5, 2002, that all documents have been transmitted to Plaintiffs.

Defendant counters Plaintiffs' figures by stating that, even if they were accurate, they are not relevant since these calculations, as reflected in Plaintiffs' own admissions, are based on guesses and

or greater than that of all the Plaintiffs in 2000, 2001 and for the projected 2002 year. *See* Id. at 2.

[9] Gulley assert that after reclassification, Goree's salary range for the IT 63 position was $29,803.49-$43,711.78, while his salary range as a Network Technician 48 was $24-,368.86-$35,740.99. App. pls.' Resp., Ex. B at 3 (Gulley Aff. II at 3). Moreover, Plaintiff asserts that although Goree Stopped getting overtime, she was getting comp-time, which is the same as getting overtime. Id. Further, according to Plaintiff, later upgrades to IT Analyst 82 and IT Analyst I from IT Analyst 81 post-May 2001 caused Goree's top base salary range to increase above that of Gulley between $7,000 to $11,000. Id.

[10] Plaintiff Simon also claims that as a result of the reclassification, by October 2001, Goree's salary range as IT Analyst I was $40,533-$66,912, while Simon's Salary range as a Network Technician G was $33,615-$55,299. See App. Pls.' Resp., Ex. C at 3 (Simon Aff. at 2) (thus claiming that Goree now makes approximately $10,000 more in base salary than him).

estimates as to the salary ranges were for each position. Def.'s Mot. To Strike pls.' Summ. J. Evidence ("Def.'s Mot. to Strike")at 8. Further, the City argues that salary ranges are irrelevant since they represent only the lowest and highest salary an employee in that position *might* make, and what is relevant is the employee's actual salary. Id. the Court finds Defendant's arguments to be persuasive on this point.

Defendant has provided the Court data supporting its assertions that Sharon Goree, following her reclassification to IT 63 in October 1998, did not have her salary adjusted upward since her previous salary as a Network Technician 48 fell within the salary range for her new grade. See Def.'s App. at 139 (beck Decl. at 2). 11 Further, in comparing Goree's hourly wage rate from before and after the reclassification with that of Bell, Gulley, Simon and Andrade, the evidence demonstrates that each employee received the same 3% cost-of-living increase of every other City of Dallas employee at the time, and Goree did not receive any additional increase in her hourly rate as a result of the reclassification. Id. at 139, (Beck Decl. at 2), 147-148 (Payroll and Leave Register). In the pre-trial hearing held before the Court on August 5, 2002, Plaintiffs' counsel conceded as much when he stated that there was no evidence of any actual increase in Goree's salary, but only a slight increase in her salary range following the reclassification.

Further, evidence of any increases and decreases in the CIS employees' gross earnings from 1998 (the year the reclassification became effective) to 2001 are explained by subsequent promotions

---

[11] Attached as an exhibit to the declaration of Rodney Beck, Human Resource Generalist in the CIS Department, is the salary schedule for exempt employees which indicates that for grade 63 the minimum-maximum hourly wage ranged from $14.33 to $21.02 per hour. Def.'s App. at 163 (Beck Decl, Ex. 3). Sharon Goree's salary before upgrade was $16.91 per hour.

which Ms. Goree received.[12] However, Plaintiffs' counsel again conceded at the pre-trial hearing that there is no evidence that the actions taken in 1998 prejudiced the Plaintiffs' ability to apply and acquire later promotions. Moreover, allegations by Plaintiffs of any failure to obtain future promotions is too speculative to show injury.

Therefore, noting the unreliability and speculative nature of Plaintiffs' own "factual" allegations, the Court finds that the City's placement of Goree into the IT 63 position did not constitute a "promotion" that would qualify as an adverse employment action for purposes of Plaintiffs' burden of establishing a *prima facie* case of sex discrimination. *See Castillo,* 2001 U.S. Dist. LEXIS 1264, at *4 (absent any competent summary judgment evidence of a currently uncorrected adverse employment decision by Defendant, plaintiff cannot sustain it's burden of showing a genuine issue of material fact concerning his claim). Further, there is no need to address Plaintiffs evidence of pretext, name that they were never approached about moving to the IT 63 position, see Pl.'s Resp. to Def.'s Mot., Ex. A at 1-3(Bell Aff. at 1-3), Ex. Bat 2-4 (Gulley Aff. at

[12] Rodney Beck's declaration also included the following table detailing the gross earnings of all CIS Department employees involved in this lawsuit.

Name	1998 year of the Reclassifi cation	1999	2000	2001	Total Salary 4 year period (includes overtime)
Luis Andrade	$64,367.14	$54,718.28	$46,784.80	$53,992.83	$219,863.05
Warryn Simon	$46,269.14	$43,247.81	$41,089.30	$47,342.50	$177.948.75
David Bell	$65,375.25	$52,032.31	$45,120.92	$50,081.00	$212,609.60
Warryn Gulley	$48,182.47	$39,356.82	$35,851.4	$50,899.08	$174,289.51
Sharon Goree	$38,292.24	$37,265.18	$40,014.00	$47,916.97	$163,488.39

2-4), Ex. C at 1-2 (Simon Aff. At 1-2), Ex. D at 1-2 (Andrade Aff. At 1-2), since cannot found that they have raised even a prima facie case of discrimination. *See Van v. Andrerson,* 199 F. Supp. 2d 550, 569 (N.D. Tex. 2002). As a result, the Court shall grant Defendant's motion for summary judgment on this point and deny Plaintiffs' own motion for summary judgment.

IV. Section 1983 and 1988 Claims

Plaintiffs Bell Andrade also allege in this case that the conduct of Defendant City of Dallas violated rights independent of Title VII, including their rights to due process and their vested property rights in continued employment at the equivalent of a grade 49 provided to them under the Dallas City Charter. Second Am. Civil Compl. At 12-13. Thus, Plaintiffs purport to bring this action pursuant to 42 U.S.C. §§ 1983 and 1988. Id. At 12-14.

Section 1983 does not create substantive rights, but rather provides a right of action for a violation of statutory or constitutional rights. *See McGregor v. Louisiana State Univ. Bd. of Sup'rs,* 3 F.3d 8:50, 867 (5th Cir. 1993). The Court limits its analysis to those allegations that Plaintiffs' procedural due process rights under the Fourteenth Amendment were violated. Second Am.Civil Compl. at 13.

Before the Court reaches the substance of Plaintiffs' allegation, Defendant insists that Bell and Andrade's § 1993 claims are untimely, and thus should be considered time

barred. Def.'s Br. At 34. Congress did not provide a statute of limitations period when it enacted 42 U.S.C. § 1983. *Delk v. Bowles,* No.3:97-CV-1224-P,1999 WL 504901, at *2 (N.D. Tex. July 16, 1999) (Solis, J.). Therefore, pursuant to 42 U.S.C. § 1988, the district court in which a section 1983 suit is filed shall apply the limitations period of the state it sits in. *Wilson v. Garcia,* 471 U.S. 261, 266-267 (1985).

Section 1983 claims are considered to be personal injury claims, and as such fall within

Texas' two year statue of limitations period. *Piotrowski v. City of Houston,* 51 F. 3d 512, 514 n.5 (5th Cir. 1995) (borrowing two-year statue of limitations from Texas law for § 1983 case). While the Court is to rely on Texas law to determine the statue of limitations period, it is section 1983 that governs when a cause of action accrues. *Rodriguez v. Holmes,* 963 F. 2d 799, 803 (5th Cir. 1992) (*citing Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991)). The accepted federal standard mandates that the statute of limitations period ""begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured."" Rodriguez, 963 F. 2d at 803 (quoting *Helton v. Clements.* 832 F.2d 332, 335 (5th Cir. 1987)); *Gonzalez v. Wyatt,* 157 F. 3d 1016, 1020 (5th Cir. 1998).

In this case, Plaintiffs' causes of action accrued when an Assistant City Manager denied in writing their request for a hearing as to their grievance concerning the reclassification, in a memo dated December 7, 1998. Def.'s App. at 74. Therefore, the deadline for Bell and Andrade to file their suit under § 1983 necessarily expired two years later-on December 7, 2000. Plaintiffs failed to include any such allegations until the filing of their Second Amended Complaint on October 10, 2001, almost a year after the statute of limitations had expired. Moreover, even if these § 1983 allegations were to relate back to Bell's first filed complaint in this case, it would still exceed the applicable limitations period since this suit was originally brought by Plaintiffs on January 4, 2001. *See generally* Orig. Civil Compl.

The absence of foundation for § 1983 liability also necessarily precludes a claim for recovery of reasonable and necessary attorneys' fees pursuant to § 1988 predicated upon the prosecution of the same underlying claims. *See Riggs v. City of Pearland,* 177 F.R.D. 395, 409 (S.D. Tex. 1997) (finding same preclusion for claims under sections 1983 and 1985). Accordingly, the Court shall

also grant Defendant's motion for summary judgment as to these claims.

V. Breach of Contract

Plaintiffs Bell Andrade further claim that they had a contract with the City whereby the City agreed to provide them with hearing before their positions could be downgraded or demoted as part of the city-wide reclassification of October 1998. Second Am. Civil Compl. at 11.

In Texas, the elements of a breach of contract claim are: (i) the existence of a valid contract; (2) the creation of duties under the contract; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Wright v. Christian & Smith,* 950 S. W. 2d 411, 412 (Tex. App.—Houston [1st Dist] 1997, no writ); *European American Bank v. Artistic Plastics & Fixtures, Inc.,* No 3:01-CV-0582-P, 2002 WL 432852, at *3 (N.D. Tex. Mar 18, 2002) (Solis, J.). A breach of contract, however, only occurs when a party fails or refuses to perform an act that it expressly promised to do. *Methodist Hospitals of Dallas v. Corporate Communicators, Inc.*, 806 S.W. 2d 879, 882 (Tex. App.—Dallas 1991, writ denied). Defendant here argues that Bell and Andrade have no evidence of either the first or fourth elements. Def.'s Br. at 29.

Plaintiffs essentially rely upon the language of the Dallas City Charter, specifically Chapter XVI, Section II, which provides that:

"[a]ny classified or unclassified officer or employee may be removed, laid off or reduced in grade by the City Manager, or the head of the department in which he is employed after six months' probationary period has expired; but, if requested by such officer or employee, it shall be the duty of the officer taking the action to furnish him a written statement of the reasons therefore and said discharged or reduced officer or employee shall have a right to demand a public hearing upon said charges within a reasonable time thereafter before the Trial Board as hereinafter defined. This right of appeal shall not apply to department directors, assistant department directors, and other managerial personnel designated by the city council."

Summary Judgment Order - Page 23
3:01-CV-0029 - P

App. Pls.' Resp., Ex. E at 29. Plaintiffs believe this provision of the city Charter provides employees, such as Bell Andrade, with certain proprietary and contractual right for employees reduced in grade after their six month probationary period. Pl.'s Mot. for Summ. J. at 12-14 (claiming reduction from Sr. Network Technician, grade 49 to Network Technician, grade 48 in October 1998). Thus, after demanding a public hearing, Plaintiffs assert Defendant refused to give them a one, and therefore breached Plaintiffs' employment contract with the city. Id. At 14.

The Court, however, notes that Chapter XVI of the City Charter can be more appropriately described as the mechanism for providing a hearing to City employees who are removed or reduced in grade because of some form of wrongdoing. [13] In this case, any reduction in grade suffered by Bell and Andrade occurred as a result of the City-wide reclassification in 1998. Plaintiffs concede as much when they assert that their reclassification had nothing to do with job performance but focused instead on the responsibilities and job duties of their positions using the Hay Guide Chart-Profile Method. See Second Am. Civil Compl. at 3; Def.'s App. at 101-104. Moreover, it is undisputed that downgrade that would entitle them to such a "public hearing upon the charges."

Equally significant here, section 11 applies only when a downgrade is done "by the City manager, or the head of the [employee's] department." App. Pls' Resp., Ex. E at 29. It is undisputed that Bell and Andreade were downgraded, not by the City Manager or the CIS Department

---

[13] Section 1 in the same Chapter XVI provides that:

"[t]he City Manager shall have the power to remove and discharge at will any subordinate employee, but such removal or discharge shall be reported in writing, together with the cause therefore, to the Civil Service board and the City Auditor. Such report shall be made when the reason is lack of work as well as in other cases."

App. Pls.' Resp., Ex. E at 29.

head, but by the Dallas City Council itself when on September 23, 1998, it unanimously passed a resolution adopting the new classifications proposed by the HR Committee. Def.'s App. at 113-120. As a result, the Court finds that, even assuming that the City Charter does constitutes a valid contract between the parties, Defendant did not "breach" the contract when it refused to provide Plaintiffs with a public hearing following the reclassification which culminated in their October 1998 grade reduction. Accordingly, Defendant's motion for summary judgment shall be granted as to this claim.

VI. Declaratory Judgment Action

Bell and Andrade further claim that they are entitled to a declaratory Judgment pursuant to the Texas' Uniform Declaratory Judgment to review the demotion and reclassification decisions by the City because its rulings and determinations violated of Bell and Andrade's constitutional rights and adversely affected their vested property rights in continued employment at the equivalent of a grade 49; (2) Plaintiffs could be demoted only upon a finding of just cause and after a hearing, neither of which was made; and (3) the policies and procedures of the Defendant as set forth in the Dallas City Charter were constitutionally defective and violated the Plaintiffs' procedural and substantive due process rights. Second Am. Civil Compl. at 8-9.

It has been stated that the Declaratory Judgment Act was never intended to apply cases then pending in court and there is no authority to enter a declaratory judgment unless such judgment will serve a useful purpose. *Barnett v. City of Colleyville,* 737 S.W. 2d 603, 606-607 (Tex. App.--Fort Worth 1987, writ denied). In Barnett, ruling that there was no necessity for a declaratory judgment by defendant when the parties were already before the court and had joined issues upon all questions involved in the lawsuit, the court noted that:

> "[t]o the prayers for relief one is added for a declaratory judgment, apparently for good measure. The [party] misapprehends the purpose of that relief,...when the parties as here have once locked horns... there is no longer room for judicial declarations separate from those which will be implicit or express in the final judgment or decree."

Id. 737 S.W. 2d at 607 (quoting *Joseph v. City of Ranger,* 188 S.W. 2d 1013, 1015 (Tex. Civ. App.--Eastland 1945, writ ref'd w.o.m.)); *see also BHP Petroleum Co. Inc. v. Millard,* 800 S.W. 2d 838, 841 (Tex. 1990) ("[t]he Declaratory Judgment Act is 'not available to settle disputes already pending before a court").

Similarly here, there was no necessity for a declaratory judgment petition as such a judgment would serve no useful purpose. Plaintiffs Bell and Andrade have not requested any additional relief that could not have been obtained through a disposition of their other claims in this case. Having already found that such claims cannot survive Defendant's motion for summary judgment, the Court will similarly grant Defendant's motion summary judgment as to this claim.

CONCLUSION

For the reasons stated above, having considered the summary judgment evidence, the applicable law, and the parties' arguments, the Court is of the opinion that Defendant's Motion for Summary Judgment shall be and is hereby GRANTED in its entirety, plaintiffs' Motion for

Summary Judgment : shall and is hereby DENIED in its entirety, and Defendant's motion to Bifurcate Trial shall be and is hereby DENIED as MOOT.

IT IS SO ORDERED.

Signed this 7th day of August, 20002.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit

FILED

July 18,2003
Charles R. Fulbruge III
Clerk

Copy

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02 – 10985
Summary Calendar

DAVID BELL; WARREN GULLEY; WARRYN SIMON; LUIS ANDRADE,

Plaintiffs-Appellants,

versus

CITY OF DALLAS.

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3:01-cv-29-p)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM: *

Plaintiffs appeal the summary judgment awarded the city of Dallas against (1) Title VII gender discrimination

claims, (2) 42 U.S.C. § 1983 procedural due process claims, and (3) state law breach of contract claims. All of the claims arose from a reorganization of the City's Communications Information Services Department, by which: male plaintiffs Bell and Andrade's positions were reclassified from grade 49 to 48; male plaintiffs Gulley and

Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47. 5. 4.

Simon's grades remained the same , but their job titles were changed; and a new grade 63 position was created, to which Goree (female , originally grade 48) was appointed. On appeal, the city is charged with: discriminating against three of the four plaintiffs, by allegedly promoting Goree; and violating Bell and Andrade's procedural due process rights and breaching their contract, by not providing a post-demotion hearing.

Summary judgment was awarded against the Title VII claim because Goree's reclassification was not an "ultimate employment decision". *E.g.*, ***Burger v. Central Apartment Management, Inc.***, 168 F.3d 875, 878 (5th Cir. 1999) (such decision include "hiring, granting leave, discharging, promoting, and compensating" (citations omitted). It wa awarded on the due process claim because it was time barred and on the contract claim because, in the context of the city-wide reclassification, the city was not obligated contractually to provide a post-demotion hearing.

A summary judgment is reviewed *de novo*. *E.g.*, ***Taita Chem. Co., Ltd v. Westlake Styrene Corp.***, 246 F.3d 377, 385 (5th Cir. 2001). Such judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c).

Bell, Gulley, and Simon (but *not* Andrade) contend Goree's reclassification from grade 48 to 63 was an "ultimate employment decision" for purposes of Title VII. They maintain Goree's reclassification: included a higher salary

range; placed her on a "career path ", which allowed for subsequent promotions; entitled her to an office; allowed her to attend school, without documenting her absence from work; and relieved her from being called to work overtime. As the district court noted, however, Goree's reclassification did not increase her pay or change her job description. In fact, it appears that, because of her new inability to earn overtime, her pay decreased as a result of the reclassification. In short, and essentially for the reasons stated by the district court, Goree's reclassification did not constitute an "ultimate employment decision".

Concerning an ultimate employment decision *vel non*, plaintiffs summary contend, in reference t Bell and Andrade, that this court "should analyze whether any of the ...parties involved received an increase or decrease in salary". (As noted, Andrade does not contest the Title VII ruling.) However, the demotions, as opposed to the city 's alleged failure to reclassify to grade 63, are entirely distinct from Goree's reclassification, and therefore cannot count as "ultimate employment decisions' for the purposes of the Title VII claim.

Regarding their demotion-related claim, Bell and Andrade maintain: the limitations period for a procedural due process action did not begin until their salary was decreased, even though their grievance concerning the claimed demotions had been denied two years earlier; and the City charter entitled those demoted (pursuant to the city-wide reclassification) to an appellate hearing. Essentially for the

reasons stated by the district court in its well-reasoned opinion, these contentions are without merit.

AFFIRMED